Venkareddy Chennareddy v. U.S. General Accounting Office

Docket No. 91-01

Date of Decision: November 24, 1992

Cite as: Chennareddy v. GAO (11/24/92)

Before: Personnel Appeals Board, en banc (Alan S. Rosenthal, Chair; Nancy A. McBride, Vice Chair; Isabelle R. Cappello, Paul A. Weinstein, Roger P. Kaplan and Leroy D. Clark, Members[1])

Discrimination

Promotion

Reprisal

Retaliation

Board Regulations

Recommended Decisions

Subpoena

Authority of the PAB

Discovery

Disparate Treatment

Discretion of Administrative Judge

DECISION

I. INTRODUCTION

Before this Board en banc is the Petition for Review of Before this Board en banc is the Petition for Review of Venkareddy Chennareddy. The gravamen of the Petition is that Petitioner's failure in 1989 to have received both a performance bonus and a promotion to a higher level position within the Respondent agency was the result of discrimination and retaliation by the agency. An evidentiary hearing on the Petition was conducted by then Board Member Jessie James, Jr., acting as an Administrative Judge. On February 6, 1992, Judge James rendered a decision in favor of Respondent. Because Judge James' term on the Board had already expired at the time he issued it, that decision is being treated as a recommended decision. See, 4 C.F.R. § 28.86(a). Accordingly, as required by subsections (b) and (c) of section 28.86, the full Board has both entertained exceptions to the decision and reviewed the record as if it were making the initial decision. For the reasons set forth in this opinion, it reaches the same result as did Judge James.

II. BACKGROUND

Petitioner is a Band II Economist in the Program Evaluation and Methodology Division ("PEMD") of the General Accounting Office ("Respondent"). On January 29, 1991, Petitioner filed a pro se Petition for Review with this Board. The petition contained two contentions. In Count I, Petitioner alleged that Respondent had unlawfully denied him a performance bonus in 1989 in retaliation for having previously filed an EEO complaint against Respondent. In Count II, he alleged that Respondent discriminated against him because of his race (Asian) and national origin (Indian) in refusing to promote him to a Band III Social Science Analyst position in 1989. As relief, Petitioner requested that he be retroactively awarded the performance bonus and the promotion denied to him, and that he also receive back pay, costs and attorney fees.

On February 19, 1991, Respondent filed its answer to the Petition for Review. In it, Respondent generally denied Petitioner's allegations and stated as a defense that Petitioner did not receive a performance bonus in 1989 because his relative performance and overall contributions to his Division were not sufficient to warrant a bonus. Respondent further asserted that Petitioner did not receive the promotion in question because he did not make the best qualified list.

After the matter was set for hearing, the parties engaged in extensive discovery, which resulted in the exchange of several discovery motions. On April 16, 1991, near the first discovery cut-off date, Petitioner retained counsel to represent him and his counsel entered his appearance. Because of the late appearance of counsel and the impending close of discovery, the discovery cut-off date was extended; Petitioner was granted additional time within which to respond to an Order of the Administrative Judge regarding the discovery requests of Respondent; and the hearing date was extended several weeks to accommodate the extension of the discovery cut-off date.

The hearing was scheduled to commence on June 19, 1991. Two days earlier, along with his list of witnesses, Petitioner filed a request for subpoenas duces tecum requiring Comptroller General Bowsher and his Special Assistant, Milton Socolar, to appear at the hearing with copies of the Equal Promotion Review Program ("EPRP") reports.[2] On June 18, Respondent moved to deny Petitioner's request for subpoenas on the ground that it was an untimely effort to obtain documents that Petitioner could have sought during discovery. Respondent also argued that the request did not satisfy the requirement of 4 C.F.R. § 28.46(c) that a motion for a subpoena specify with particularity the evidence desired and be supported "by a showing of general relevance and reasonable scope and a statement of the facts expected to be proven thereby."

At the inception of the hearing on June 19, the Administrative Judge allowed oral argument on Petitioner's request for subpoenas and directed the parties to file written briefs on the subject. Petitioner and Respondent filed their briefs on June 20 and 25, respectively. On July 8, after additional oral argument on the issue, the Administrative Judge denied the request on the principal ground that Petitioner failed to show the relevance of the EPRP reports to Petitioner's allegations in the case. The Administrative Judge also ruled that, because the requested documents could have been sought in discovery, Petitioner's failure to attempt to discover them further militated against issuing the subpoenas.

The hearing concluded on July 11, 1991. On February 6, 1992, following the submission of post-hearing briefs, the Administrative Judge issued his decision.

III. CONTENTIONS OF THE PARTIES

A. Petitioner's Contentions

Petitioner contends that he was denied a bonus in 1989 in retaliation for his previous involvement in equal employment opportunity (EEO) activity. Specifically, Petitioner alleges that in 1984 he had filed a series of complaints charging that he had been denied several promotions because of discrimination on the basis of his race, age, and national origin. According to Petitioner, Eleanor Chelimsky, the Assistant Comptroller General for PEMD, was the alleged discriminating official in one of the EEO complaints he filed in 1985, and Ms. Chelimsky was also the sole deciding official in the decision by Respondent not to award Petitioner a bonus in 1989. Petitioner alleges that he was denied the bonus because of retaliation and racial and national origin discrimination, as evidenced by the fact that his score on the bonus ranking system was higher than that of many of the persons in his Division who received bonuses; that he was placed in a one-person unit and was the only employee in such a unit in his Division who did not receive a bonus; that Ms. Chelimsky admitted that she was unfamiliar with his work; and that he had been intentionally assigned to work that was far below his skill level, experience, education and general qualifications.

With respect to the failure of Respondent to promote him to the position of Social Science Analyst III, Petitioner contends that that failure was the result of discrimination based upon his race and national origin. Petitioner argues that he was the victim of discriminatory treatment in the promotion process because his application in connection with an earlier promotional opportunity had been downgraded for technical deficiencies, while the applications of other candidates for promotion (including the successful applicant for the Social Science Analyst III position) had technical deficiencies that should have disqualified them, but they were neither disqualified nor downgraded. Petitioner further argues that the selection process for the promotion was rigged against him because the selection panelists had knowledge of the previous EEO complaints he filed against the Respondent. With that knowledge, Petitioner maintains, the panelists deliberately ignored his history of achievements while employed by Respondent and selected a candidate who was less qualified than he in terms of education, experience and time of service with the Respondent.

B.Respondent's Contentions

With respect to the denial of a bonus, Respondent contends that the decision not to award Petitioner a bonus was made on the basis of factors totally unrelated to retaliation. It asserts that employees are awarded bonuses on the basis of the significance of the work they perform and the extent to which that work contributed to the overall mission of their respective divisions during the rating period. Respondent states that its employees were asked to explain the significance of their contributions during the rating period by filling out contributions statements, and the statements were then considered by an evaluation panel as part of its undertaking. Respondent contends that Petitioner's contribution statement was deficient because it described work that was not performed during the rating period, work for which Petitioner received poor performance ratings and work that had to be partially revised by Petitioner's supervisor. Therefore, Respondent argues, Petitioner did not perform work during the rating period that would have entitled him to receive a bonus in comparison to the employees who were awarded bonuses.

With respect to Petitioner's claim that he was denied a promotion to the Social Science Analyst III position, Respondent contends that Petitioner's non-selection for the position was the result of neither discrimination nor retaliation. It further argues that Petitioner was not selected because he was not as qualified as the other candidates who made the best qualified list. Respondent insists that the promotional selection was based, in large measure, on the ratings the candidates received on their more recent performance appraisals. According to Respondent, the selection panel looked closely at the applicants' abilities in the areas of research, planning, supervision, data gathering, documentation, and communication, and ascertained that, in his performance appraisals, Petitioner was ranked only "fully successful" in the job dimensions relevant to research, planning, supervision and communication, while the other candidates had been appraised by their supervisors at the "exceptional" or "superior" level in those dimensions. Respondent also asserts (1) that, on his penultimate performance appraisal, Petitioner was evaluated as needing improvement in the areas of oral and written communication, data gathering, data analysis, supervision, and documentation; and (2) that his work tended to be disorganized. According to Respondent, Petitioner's most recent performance appraisal indicated that his work in these areas had not substantially improved.

IV. SUMMARY OF RECORD EVIDENCE

A total of nine witnesses, including the Petitioner, testified. Five of the witnesses were called by both Petitioner and Respondent, but testified just once, with the rules of evidence being relaxed in order to allow the parties maximum freedom in examining the witnesses. A total of 27 exhibits were admitted into evidence.

A. The Bonus Claim

As previously noted, Petitioner is a Band II Economist in PEMD. He has an M.A. in Economics, an M.S. in Statistics, and a Ph.D. in Economics, with emphases in Economic Analysis, Mathematical Statistics and Operations Research. Petitioner also has ten years of teaching experience. Tr. 48. He began his employment with Respondent in 1978 as a GS-12 Economist. Tr. 49. Approximately nineteen months thereafter, he was promoted to GS-13. Tr. 48-49.

As an economist, Petitioner reviews research in economics that may be of use to GAO evaluators. He also provides analytical background, develops research models and writes technical reports for appendices and chapters for evaluators. Tr. 358-363. In general, Petitioner provides support services for evaluators within GAO. Tr. 48-49, 362-66.

PEMD has approximately ninety to one hundred employees and is divided into three subdivisions or units: Physical Systems (PEPSA), Human Resources (PEHSA), and Quality Control.

The bonus which Petitioner claims he was wrongfully denied was a component of Respondent's "Pay For Performance (PFP) System" which was initiated in 1989 and covers evaluator, evaluator-related, and attorney positions. PFP consists of two components, a bonus component and a permanent merit increase component. Respondent initiated PFP by phasing in the bonus component in the summer of 1989. The permanent merit increase component was phased in the following year. The purpose of the bonus component is to give awards to employees for excellent work. Tr. 553-54.

The primary testimony describing the Respondent's PFP system came from Joan Dodaro, the Deputy Assistant Comptroller General for Operations, who is Respondent's chief official for all human resource activities, including personnel, promotions, bonuses, recruitment, and training. Tr. 553.

To determine who among the covered employees would receive a bonus, Respondent's regulations created what it called an "assessment process". See Resp. Ex. 14, admitted into evidence at Tr. 555. The "assessment process" pertinent to this action encompassed the rating period beginning June 1988 and ending June 1989. Tr. 553.

As applied to PEMD employees (including the eight under the PFP system who were in the Quality Control unit), the assessment process for the 1988-89 rating period worked in this manner: Separate management review groups (or rating panels) were established for each of the three PEMD subdivisions. Those panels were drawn from Band III and SES personnel within the particular subdivision. Their task was to provide ratings for each employee within their jurisdiction on a 60-point scale. As explained in greater detail in Malphurs v. GAO, Docket No. 91-04 (Dec. 12, 1991), affirmed by the Board en banc (July 8, 1992), 40 of those points were based upon a mathematical computation derived from the employee's performance appraisal for the rating period in question. The other 20 points represented the panel's appraisal of the value of the employee's contribution to the agency's mission during that period, an appraisal which likely will have been influenced by any contributions statement that the employee chose to submit for the panel's consideration. Tr. 372, 576-78.

After having obtained total scores on the 60-point scale for each employee, the panel's next responsibility was to rank the employees on the basis of those scores. Separate ranking lists were prepared, however, for employees on each of the different grade levels. Thus, for rating purposes, a unit that had employees on, e.g., the GS-12, GS-13, and GS-14 levels could have had three distinct ranking lists. Tr. 564-66.

Once the ranking lists were compiled, they were sent to the Division head, Ms. Chelimsky, who had the decisional authority as to which PEMD employees (within a 50 percent overall limitation) should receive bonuses. Tr. 564-67. In the exercise of that authority, she did not have available to her the actual scores awarded by the panels to the employees but, rather, solely the ranking lists themselves. The significance of those lists from her standpoint was simply that she could not award a bonus to one individual on a particular ranking list and, at the same time, withhold a bonus from a person occupying a higher position on the same list. Tr. 564-67.

Although one of eight PFP-covered employees in the Quality Control subdivision of PEMD, Petitioner was the only GS-13 among the eight. (The other seven were five GS-15s and two GS-12s.) Thus, under the established PFP procedure applicable throughout the agency, he appeared on a ranking list that contained his name alone. This being so, Ms. Chelimsky was constrained to consider his entitlement to a bonus without regard to the ranking of any other PEMD employee, whether that employee was in the Quality Control subdivision or some other subdivision. Tr. 565-68, 372-76.

As earlier noted, Ms. Chelimsky decided against conferring a bonus upon Petitioner. According to Petitioner, who was his own primary witness, that decision was prompted by a series of complaints he had filed in 1985, alleging in totality that the failure to have been chosen for one or another of the five positions for which he had applied was the result of discrimination on the basis of sex, race, age and/or national origin. The complaints -- one of which named Ms. Chelimsky as the alleged discriminating official -- were not resolved until 1988, when a decision adverse to Petitioner was issued by this Board. Chennareddy v. GAO, Docket No. 70-701-17-85 (Jan. 4, 1988) (en banc).

In support of his claim that the denial of the bonus was in retaliation for the filing of the earlier complaints, Petitioner pointed out that the total score that he received from the ranking panel -- 50.43 -- exceeded that of several other PEMD employees who were awarded bonuses. He also maintained that Ms. Chelimsky admitted that she was unfamiliar with his work and that he had been intentionally assigned to work that was far below his skill level, experience, education and general qualifications. In this connection, Petitioner produced the affidavit of Robert Jones, his supervisor during the rating period in question, to the effect that he had recommended that Petitioner receive a bonus. Pet. Ex. 4B, admitted into evidence at Tr. 180. Still further, Petitioner claimed that he had encountered Ms. Chelimsky in a corridor and she had told him, "laughing sarcastically," that she would not "go by" his supervisory ratings in determining whether to award him a bonus. Tr. 181-83.

Although she acknowledged being named as the alleged discriminating official in one of Petitioner's prior complaints, Ms. Chelimsky disclaimed any interest in retaliating against Petitioner and denied that she had had a corridor conversation -- or indeed any conversation--with Petitioner regarding a bonus. On this score, she observed that employees are awarded bonuses on the basis of the significance of the work they perform and the extent to which that work contributed to the overall mission of their respective divisions during the rating period. According to Ms. Chelimsky, Petitioner's contribution statement was deficient because it described work (on a social security paper) that was not performed during (but rather prior to) the rating period in question. She further testified that, even though she knew that for this reason the work described in Petitioner's contribution statement should not be credited in making bonus decisions, nevertheless she was prepared to take the statement into account. Consequently, she reviewed Petitioner's performance appraisal for the earlier period referenced in the contribution statement. She was surprised to find that the appraisal was low and sought out Petitioner's then supervisor, Robert York, for further clarification. She testified that Mr. York told her that Petitioner received a poor performance appraisal for the social security paper because his work on the project was poor, and the paper had to be re-written by Mr. York. Ms. Chelimsky's conclusion was that, because Petitioner did not demonstrate that he had performed work that would have entitled him to receive a bonus in comparison to the employees who were awarded bonuses, she could not in good faith award Petitioner a bonus. Tr. 384-97.

B. The Promotion Claim

With respect to Petitioner's claim of discriminatory denial of a promotion, the evidence, as elicited principally from the testimony of Petitioner and the members of the promotion ranking panel, shows that the position Petitioner sought was a supervisory project manager position (Social Science Analyst III) in the Human Resources Division that came into existence as part of Respondent's lateral reassignment program. Tr. 201. Respondent advertised the position as vacant in its August 1989 issue of Management News. Tr. 235. Only applicants within GAO could apply and be considered for the position. Ibid.

Upon learning of the vacancy, Petitioner applied for the position through submission of the appropriate documentation. To be considered, an applicant was required to complete the necessary paperwork and to submit it to his or her home unit. Tr. 238. The home unit then forwarded all of the applications to the Office of Personnel. Tr. 239. In that Office, the applications were reviewed to determine whether they met the minimal qualifications set forth in the announcement. Ibid. Upon completing the initial screening phase, Personnel forwarded the application packages to the selecting unit. Ibid. In the selecting unit, the applications were held until a panel was established to rate and to rank the applicants and to establish who among the applicants should be placed on the highly qualified or best qualified list for consideration by the selecting official. Tr. 216.

Including Petitioner, eleven individuals applied for the position in question. Upon receipt of their application packages and completion of its initial qualification review and certification, Personnel forwarded all eleven packages to the Human Resources Manager in the Human Resources Division (HRD). Tr. 209. The Human Resources Manager then reviewed the packages to determine whether each application package contained all of the necessary forms and documents. Tr. 210.

Consistent with Respondent's selection procedures, following that review the Human Resources Manager determined that a merit selection panel was necessary and appointed three individuals to the panel. Tr. 209, 216. One member of the merit selection panel was in charge of Respondent's data analysis group, the second was responsible for Respondent's income security issue area, and the third was a Band III Social Science Analyst. Tr. 242-43. Upon their appointment, the panel members met and, after deliberations, rated and ranked the applicants in descending order, one through eleven. Tr. 222-24. After rating and ranking the applicants, the panel established a cut-off score to determine which of the eleven applicants should be placed on the best qualified list for referral to the selecting official. Tr. 226-28. The cut-off score was set at 56.7 and the nine applicants who had a score of 56.7 and above were placed on the list. Ibid. Petitioner was ranked eleventh and was one of the two applicants who did not make the list. Ibid.

Petitioner insisted that his failure to receive the promotion was the result of discrimination based upon his race and national origin. Tr. 424. He testified that he had consistently been the victim of discriminatory treatment in the promotion process. Tr. 426-28, 466-78, 488, 500. In this connection, he noted that an earlier application for a higher level position had been downgraded (i.e., he had lost points in its consideration) because of alleged technical deficiencies. Tr. 459-61. At the same time, other applicants for various higher level positions (including the applicant who received the promotion to Social Science Analyst III) had technical deficiencies in their applications that should have led, but did not lead, to disqualification or a loss of points. Tr. 490. Petitioner further testified that the selection process for the promotion to Social Science Analyst III was rigged against him because the selection panelists had knowledge of the previous EEO complaints he had filed against the Respondent. Tr. 465-66. Armed with that knowledge, Petitioner asserts, the panel deliberately ignored his history of achievements while employed by Respondent and selected a candidate who was less qualified than he in terms of education, experience and length of GAO service. Tr. 439-40. Petitioner also testified that further evidence of the promotion panel's intent to discriminate against him was the fact that all three of the promotion panelists had previously worked for Ms. Chelimsky, the official charged with retaliation against Petitioner in the PFP bonus process. Tr. 492.

The three members of the promotion panel, Joseph Delfico, James Wright, and Erwin Bedarf, each testified. Two of them (Mssrs. Wright and Bedarf) acknowledged being aware that Petitioner previously had filed some kind of grievance or complaint against Respondent. All three testified that Petitioner's prior protected activity played no role whatsoever in their deliberations concerned with the promotion rankings. Each of the three also maintained that no mention of Petitioner's grievances was ever made during the promotion panel deliberations. Tr. 269, 313-14, 342, 354-55.

The panel members testified in turn that the panel did not separately evaluate education, seniority and outside experience. Rather, those factors were considered only in the context of (1) the specific standard job dimensions and ranking factors (such as data gathering, planning, and oral and written communication) on which Petitioner was routinely appraised in his current position; and (2) certain additional ranking factors (such as the ability to communicate highly technical methodologies) that were designated as particularly important in the case of the Social Science Analyst III position. When asked to

compare Petitioner's application package with that of the ultimate selectee, for the purpose of explaining why they rated Petitioner so much lower on the scale notwithstanding that the selectee had less GAO experience than Petitioner, the panel members testified that they gave each candidate for the promotion a score in each job dimension and additional ranking factor based on how they thought the candidate would perform in the Social Science Analyst III position. They observed that Petitioner's lower scores were primarily the result of significantly lower ratings on his performance appraisals, as well as his lower ratings on an appraisal respecting the additional ranking factors that had been supplied by his current supervisor. The panel members also testified that, because the Social Science Analyst III position is a management position (supervising a number of evaluators and specialists in up to five to eight projects simultaneously), they critically evaluated oral, written and technical communication, and supervisory potential, and Petitioner did not measure up on those factors as well as the other candidates. Tr. 239, 255, 277-80, 284-87, 310-12, 320-22, 343-45. 348-52.

Robert Farabaugh, the Human Resources Manager for the Human Resources Division and the official who selected the promotion panel members, testified that he was not aware of Petitioner's prior discrimination complaints. Tr. 245. He also testified that he was unaware of the fact that the promotion panelists had all previously worked for Ms. Chelimsky. Ibid. He added that he chose the persons based on their knowledge of the requirements of the position. Tr. 225-26. Mr. Farabaugh stated that he did not believe that any of the three promotion panelists was biased in any way against Petitioner and that he would not pick a person to be on such a panel if he was aware of anything that would bias that person's judgment. Ibid.

Lawrence Thompson, the Assistant Comptroller General in charge of the Human Resources Division, who was the selecting official for the Social Science Analyst III position in question, testified that he received from the promotion panel an alphabetical list of names of the candidates who made the best qualified list, along with their application packages, but that the list did not contain the scores each received in the ranking process. Mr. Thompson testified that he selected Donald Snyder on the basis of relative qualifications, based on his belief that Dr. Snyder was the best person for the position. Tr. 620-23.

V. THE RECOMMENDED DECISION

On the basis of the record evidence discussed above, Administrative Judge James found that Petitioner had established a prima facie case of both retaliation (with respect to the denial of a PFP bonus), and discrimination (on the promotion claim). He went on to rule, however, that Respondent had articulated legitimate nonretaliatory reasons for denying Petitioner a bonus and nondiscriminatory reasons for failing to promote Petitioner, and that Petitioner had failed to prove, in either context, that Respondent's stated reasons were pretextual.

Specifically, with respect to the bonus determination, Judge James first found that Petitioner applied for and was denied the bonus, that he was eligible to receive a bonus, and that Ms. Chelimsky, who was the deciding official who denied Petitioner the bonus, was aware of Petitioner's prior protected activity--facts sufficient to make out a prima facie case. Judge James then found that Respondent's articulated reason for denying Petitioner the bonus--that Petitioner's performance during the bonus rating period was not as deserving as that of other of Respondent's employees-- was a legitimate, nonretaliatory reason, and that Petitioner failed to carry his ultimate burden of establishing that the bonus selection process was in any way retaliatory, or that the decision to deny Petitioner a bonus was made with retaliatory intent or purpose.

With respect to the denial of promotion to the position of Social Science Analyst III, Judge James concluded that Petitioner had made out a prima facie case of discrimination because the evidence demonstrated that he applied for the position, was qualified for the position, was rejected, and a person not of Petitioner's protected class received the promotion. In Judge James' opinion, however, Respondent had articulated a legitimate, nondiscriminatory reason for Petitioner's nonselection for the promotion when it presented evidence that the selected individual had been determined to have better qualifications, based on a genuine application review process. On this score, Judge James found that Petitioner failed to show that Respondent's proffered reason for rejecting Petitioner, and preferring the selectee, was pretextual.

Judge James concluded that Petitioner had failed to carry his burden of proving that Respondent had denied him a performance bonus in 1989, or had refused to promote him to the position of Social Science Analyst III, because of discrimination or retaliation -- therefore, Petitioner was not entitled to any of the relief sought in the Petition for Review. Accordingly, Judge James directed that the Petition for Review be dismissed with prejudice.

V. PETITIONER'S EXCEPTIONS TO THE RECOMMENDED DECISION

On March 10, 1992, Petitioner filed a Motion to Reopen and Reconsider the decision of the Administrative Judge. Prior to the filing of Respondent's opposition to the motion, the Board determined that the Administrative Judge's decision would be treated as a recommended decision, and not as an initial decision, and allowed the parties to file pleadings responsive to that order. Petitioner then supplemented his motion with an additional pleading, and the Respondent filed its opposition.

Petitioner makes two primary assignments of error in his initial motion. The first is that the Administrative Judge abused his discretion in refusing to grant Petitioner's request for a subpoena of the EPRP reports, and thereby arbitrarily and capriciously excluded material evidence from the record. Petitioner argues that the EPRP reports would have shown conclusively the existence of racial bias in Respondent's HRD and PEMD divisions, as well as provided evidence of systemic discrimination throughout GAO. Petitioner further contends that the traditional discovery rules did not apply to the requested information, and that it was not necessary to discover the EPRP reports and their content, because he and his counsel already knew of their existence. Therefore, he maintains, it was merely necessary to list the EPRP materials as trial exhibits in order to get them into evidence. Petitioner additionally insists that listing the EPRP reports as trial exhibits was all that was required by the Board's regulations to support his request for a subpoena of the documents.

Petitioner's second assignment of error is that the recommended decision is arbitrary, capricious, and otherwise not consistent with law in that the evidence of record clearly shows that he was denied the bonus because of retaliation for prior protected activity and denied the promotion because of race and national origin discrimination. The stated support for this claim is:

1. The selecting officials involved in the denial of a bonus and the refusal to promote Petitioner to the Social Science Analyst III position were also involved in Petitioner's previous EEO complaints heard by this Board.

2. Petitioner's second-line supervisor (Robert Jones) stated in an affidavit that he thought Petitioner should have gotten a bonus, and that the deciding official, Ms. Chelimsky, did not speak to Mr. Jones before she made the decision on Petitioner's bonus.

3. Petitioner's bonus ranking score was higher than that of some six other GS-13 employees in PEMD who received bonuses.

4. Petitioner was the only GS-13 employee in a one-person unit who did not get a bonus.

5. The Administrative Judge ignored contradictions in the evidence in ruling that Petitioner did not prove that his bonus was denied because of discrimination and retaliation.

6. The panel which reviewed the applications for promotion to the Social Science Analyst III position was biased and used discriminatorily subjective criteria to prevent Petitioner from making the "best qualified" list.

7. The Petitioner was, in fact, the best qualified of all of the applicants for the Social Science Analyst III position.

8. The members of the panel evaluating the applicants for the Social Science Analyst III position were aware of Petitioner's prior protected EEO activity.

9. GAO formed the promotion rating panel in violation of established GAO procedures.

10. Petitioner's earlier application for promotion to a higher level position was rejected because of a technical deficiency, while White employees whose applications for promotion contained similar technical deficiencies were not rejected.

In his supplemental exceptions to the recommended decision, Petitioner adopted the arguments advanced in his initial pleading and requested that the record be reopened for the purpose of reconsidering the evidence already adduced as well as supplementing the record with the assertedly improperly excluded EPRP reports. Petitioner further requested that the evidence be evaluated de novo in light of the Civil Rights Act of 1991, which had been enacted during the pendency of Petitioner's case. Petitioner would have the Board, in passing on the evidence under the standards of that statute, find that he was the victim of retaliation and discrimination and award compensatory damages for the conduct of Respondent.

VII. ANALYSIS

A. Standard of Review

The standard of review of recommended decisions is set forth in 4 C.F.R. § 28.86. That section stipulates that the Board is to review the record as though it were making the initial decision. Upon such review, the Board may adopt, reverse, remand, modify or vacate the recommended decision, in whole or in part. The decision must be rejected, in whole or in part, if the Board finds that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed;

(2)The recommended decision is based on an erroneous interpretation of statute or regulation;

(3)The recommended decision is arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(4)The recommended decision is not made consistent with required procedures and results in harmful error; or

(5)The recommended decision is unsupported by substantial evidence required by the requisite burden of proof as set forth at § 28.61.

4 C.F.R. § 28.86(d).

B. The Administrative Judge's Procedural Ruling

Petitioner alleges that the Administrative Judge erred in denying Petitioner's request for a subpoena of the EPRP reports, which reports assertedly were vital to the substantiation of Petitioner's claims of discrimination. The Administrative Judge declined to subpoena the EPRP reports for two independent reasons: Petitioner failed to demonstrate with the requisite specificity the relevance of the requested information and the facts to be proven thereby, and Petitioner failed to request the information in discovery and waited until the time of the hearing to request the documents.

It is well settled that decisions regarding the admission or exclusion of evidence are peculiarly within the province of the trier of fact, and will not be reversed unless they constitute a clear abuse of discretion. Simplex, Inc. v. Diversified Energy Systems, Inc., 847 F.2d 1290, 1292 (7th Cir. 1988), reh'g. denied (citing cases); McKenna v. Weinberger, 729 F.2d 783, 792 (D.C. Cir. 1984). We do not find that the ruling of the Administrative Judge with respect to the EPRP reports were an abuse of discretion.

The arguments made by Petitioner on the record at the hearing, and in his pleadings filed in support of the request for subpoena, are not persuasive. To begin with, Petitioner's counsel admitted that he did not know specifically what was contained in the reports. The most that he could offer was his impression that they contained evidence of systemic discrimination against minorities, and that such evidence would help in establishing an inference of discrimination against Petitioner. Tr. 19-21.

In seeking production of a document during the discovery process, a party need not establish its relevance; indeed, one of the purposes of discovery is to enable the parties to ascertain the existence of relevant documents. Thus, had Petitioner requested the EPRP reports in the course of discovery, he undoubtedly could have obtained them (unless found to be privileged) without any demonstration of relevancy. By not pursuing that avenue, but rather attempting to obtain them through resort to the subpoena process, Petitioner necessarily assumed the obligation, imposed by 4 C.F.R. § 28.46(c), of making a general showing of the relevance of the reports, as well as providing a statement of the facts that would be established by them. That obligation was not satisfied.

Moreover, we agree with the Administrative Judge that Petitioner's request for the subpoenas was tardy. Our rules require that the party opposing a request for a subpoena be allowed 20 days to file its opposition to the subpoena. 4 C.F.R. § 28.47. Petitioner waited, however, until two days before the hearing to request the subpoena of material that could have been obtained during discovery. That plainly was too late.

We therefore affirm the decision of the Administrative Judge with respect to the denial of subpoenas for the EPRP reports.

C. The Decision on the Merits

The standards governing the order of presentation and allocation of proof in an employment discrimination action involving a single individual were set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If a denied promotion is in issue, the individual plaintiff (here Petitioner) must show, in order to establish a prima facie case, that (1) he or she is a member of a protected class; (2) that he or she applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite those qualifications, he or she was rejected; and (4) that, after the rejection, the position remained open and the employer continued to seek applicants from persons with plaintiff's qualifications. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 250 (1981).

Once a prima facie case has been made, the burden of going forward with the evidence shifts to the defendant (here Respondent), which must put forth by admissible evidence a legitimate, nondiscriminatory reason for plaintiff's rejection for promotion. McDonnell Douglas, supra, 411 U.S. at 802. If the Respondent successfully meets that burden, Petitioner may still prevail by showing that the Respondent's proffered reason is, in fact, a pretext for discrimination. Texas Dept. of Community Affairs v. Burdine, supra, 450 U.S. at 254-56. At that stage, the Petitioner's burden of showing pretext merges with his ultimate burden of proving that he has been the victim of intentional discrimination. Ibid.

In all cases of individual employment discrimination, motivation and intent are the ultimate issue. The court will inquire into whether the presumptively valid reasons for plaintiff's denial of promotion were in fact a cover-up for racially discriminatory decisions. McDonnell Douglas, supra, 411 U.S. at 805. Intentional discrimination might be established by demonstrating that an employer treats some people less favorably than others; discriminatory motives may sometimes be inferred from the mere fact of differences in treatment. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (citing Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977)).

Retaliation cases are also typically analyzed under the McDonnell Douglas paradigm. Chen v. General Accounting Office, 821 F.2d 732, 738 (D.C. Cir. 1987). In order to make out a prima facie case of retaliation, the Petitioner must show that he engaged in protected activity of which his employer was aware, that a personnel action adverse to the Petitioner followed the protected activity, and that there was a causal connection, or nexus, between the adverse personnel action and the protected activity. If the employee succeeds in establishing his prima facie case, the burden of going forward then shifts to the employer to articulate, through admissible evidence, a legitimate nonretaliatory reason for the taking of the adverse personnel action. Should the employer carry that burden, the employee can succeed only by proving that the employer's articulated reason is pretextual.

We find that the Petitioner has established a prima facie case on his allegations of discrimination and retaliation. Petitioner engaged in protected activity of which Respondent had knowledge and, subsequent to the protected activity, Petitioner was denied a bonus and also rejected for a promotion. Petitioner was eligible to receive both the bonus and the promotion. And persons not of Petitioner's protected class were given bonuses, and the promotion Petitioner sought went to a person not of Petitioner's protected class.

We are equally satisfied, however, that Respondent sufficiently fulfilled its obligation of demonstrating legitimate, nonretaliatory reasons for denying Petitioner a bonus and promotion, respectively. Moreover, Petitioner did not carry his ultimate burden of establishing that those reasons were pretextual.

In challenging the reasons assigned by Ms. Chelimsky for concluding that his performance during the rating period did not merit a bonus, Petitioner relies on the fact that, in an affidavit, Mr. Jones, his immediate supervisor, stated that he had recommended him for a bonus. That recommendation, however, was not given to Ms. Chelimsky, but rather was supplied simply to the ranking panel. Moreover, during cross-examination of Ms. Chelimsky, Petitioner's counsel made no endeavor to ascertain why she had not consulted Mr. Jones in making her bonus decision. In the circumstances, we do not attach great significance to the Jones affidavit, particularly because in that affidavit he went on to state that he had "no reason to believe that [Petitioner] was discriminated against on the basis of race, color, national origin or EEO activity."

Petitioner also relies on the fact that his bonus scores were higher than those of six other PEMD GS-13 employees who received bonuses. As Respondent explained, however, employees are evaluated only against other employees possessing the same grade in the same unit of PEMD, and none of the other GS-13s who received bonuses was in the same unit (Quality Control also referred to as the headquarters unit of PEMD) as Petitioner. (Indeed, it appears from the record that no one of the eight employees in the headquarters unit received a bonus in 1989. Tr. 370-74.) Petitioner has offered nothing to convince us that this explanation is pretextual and, without more, we find no reason to regard the relative bonus scores as persuasive evidence of retaliation.

Petitioner argues that pretext was shown by the fact that he was the only GS-13 employee in all of GAO who worked in a one-person unit and did not receive a bonus. However, the clear evidence of record shows that Petitioner did not work in a one-person unit but, instead, was on a one-person ranking list as the only GS-13 in his particular unit. More important, Petitioner offered no evidence to suggest that Ms. Chelimsky treated differently for bonus purposes any other PEMD employee on a one-person ranking list. To the contrary, Petitioner's own submission on the point (Ex. 3, provisionally admitted into evidence at Tr. 88) affirmatively reflects that none of the other GS-13 employees on one-person ranking lists was in PEMD and, as such, rated by Ms. Chelimsky. In the circumstances, whether or not they received bonuses scarcely bears upon the validity of Ms. Chelimsky's decision not to award a bonus to Petitioner. Moreover, as just noted, no one in Petitioner's PEMD unit -- whether on a one-person ranking list or not -- was given a bonus by Ms. Chelimsky. Absent some evidence -- and there was none -- that each of the other employees in the unit was either a member of a protected class or a prior grievant, this fact is highly significant in assessing the likelihood that some improper motive may have undergirded Ms. Chelimsky's bonus determination in Petitioner's case.

Finally, we see no reason why we must credit Petitioner's account of a purported conversation he had with Ms. Chelimsky in a building corridor -- a conversation which she emphatically denied ever took place. Had such an event actually occurred, it seems most probable that, particularly given his prior experience with the agency's grievance process, Petitioner would have immediately prepared some record of the event or, at the least, recounted it to some fellow employee or to a civil rights counselor. Insofar as the record discloses, he did neither.

Turning to the matter of the promotion, we find no compelling evidence of bias or retaliatory animus on the part of any of the members of the promotion panel. The members of the panel each testified as to the role Petitioner's performance appraisal rankings played in his ranking on the best qualified list. The evidence shows that Petitioner's ratings on his performance appraisals were the lowest of any of the applicants in the group. Petitioner only contested his performance appraisals in his posthearing pleadings, admitting that he never complained about the appraisals at the time they were issued.

Petitioner insists that the panel was biased because it considered several years of Petitioner's performance appraisals, which included two of Petitioner's poorer appraisals, while only considering the more recent performance appraisals of two candidates who made the "best qualified" list. Again, however, there is no evidence that consideration of those performance appraisals was the result of bias on the part of the reviewers. To the contrary, the record discloses that the two candidates who had less than three years of performance appraisals submitted with their promotion application packages had been employed by GAO for no more than one and one-half years, and, therefore, could not have submitted three years of performance appraisals. In short, Petitioner's complaint that relatively poor performance appraisals were discriminatorily taken into account is wide of the mark.

Petitioner also maintains that he was, in fact, the best qualified of all the claims for the Social Science Analyst position. All of the claims made by Petitioner to support that assertion amount to no more than self-serving declarations of his own qualifications. Petitioner's resume indicates that he is very well-educated, and Petitioner's testimony shows that he considers himself to be a dedicated employee. However, Petitioner makes no effort to compare his qualifications, based on the relevant duties of the position as stated in the vacancy announcement (and the ranking factors used by the promotion panel), with those of the persons who successfully made the "best qualified" list. Significantly, the ultimate selectee was given the highest rating, "exceptional", in all of his additional ranking factors, while Petitioner was rated no better than "superior" in his additional ranking factors and, in most of the factors, he was rated "fully successful". We find no evidence on the record that would indicate that the panel was in any way prejudiced against Petitioner in rating the candidates for promotion. Moreover, the panel members stated clearly that education, experience and seniority were not evaluated separately, but only as components of the other ranking factors.

Petitioner alleges that Respondent failed to abide by its own regulations in making up the panel to evaluate candidates for the Social Science Analyst III position for which Petitioner was rejected. Petitioner interprets the wording in GAO Order 2335.8, ch. 2(g) as requiring that at least half of the panel members for specialist positions be qualified in the specialty of the position. Certainly, an employer's clear deviation from its own required procedures can serve as evidence of pretext in a discrimination case. See, e.g., Mohammed v. Callaway, 698 F.2d 395, 399 (10th Cir. 1983). However, the record does not reflect such an occurrence here. Our reading of the cited provision of Order 2335.8 does not comport with Petitioner's. The specific language states that "[a]t least half of the local management review panel members must be competent to evaluate the candidates' technical qualifications [for the position]." In our view, being competent to evaluate a person's technical qualifications does not require that a person be similarly qualified in the candidate's specialty, but merely dictates sufficient familiarity with the area to enable an informed judgment respecting the qualifications of the candidates. And it is clear that the panel in question was competent to judge the candidates' qualifications. One of the panel members, Mr. Bedarf, is a Band III Social Science Analyst and, therefore, is clearly qualified for the panel. Another, Mr. Delfico, was the person who would immediately supervise the holder of the position in question. The third, Mr. Wright, is the head of the group (Design and Data Analysis) that employs the largest number of social science analysts in the division.

Petitioner also claims that Respondent failed to follow its own procedures in the matter of the screening of applications by Respondent's recruitment office and, as a result, he was the victim of disparate treatment. Specifically, Petitioner refers to the rejection of his earlier application for another position on the ground of a technical deficiency, while similarly situated White applicants did not have their applications for the Social Science Analyst III position rejected notwithstanding assertedly like technical deficiencies. In

addressing this point, Petitioner analogizes his situation only to that of the person who was selected for the Social Science Analyst position. Our analysis of the record indicates, however, that Petitioner and the selectee were not similarly situated.

Petitioner's application for the earlier vacancy was not actually rejected. In point of fact, Petitioner merely lost points because he did not properly complete the job elements form that accompanied the vacancy announcement for the position in question. The job elements form is a weighted form used to rank the applicants during the prescreening process. The instructions at the top of the form clearly indicate that failure to follow the instructions in completing the form will disqualify the applicant's answer for that element, and the applicant will not receive ranking points for that element. As a result of his failure to follow the directions on the job elements form, Petitioner filled out two sections of the form incorrectly, and lost points for those two ranking elements. Consequently, Petitioner did not receive enough points in the ranking process to make the best qualified list for the position.

On the other hand, Dr. Snyder, the selectee for the Social Science Analyst III position, submitted an application package for the position which contained a supervisory appraisal that had not been signed by the rater's supervisor. All of the witnesses testifying for Respondent stated that, on the promotion review level, applications are not usually screened for such technical deficiencies as omitted, nonessential signatures, and that such an omission would never be sufficient grounds to disqualify a candidate. Nor is there evidence on the record indicating the existence of any rule or procedure requiring that applicants be disqualified from consideration for failure to have all of the required signatures on an appraisal form submitted with an application package.

In sum, Petitioner and Dr. Snyder are clearly not similarly situated with respect to the technical defects in their applications. Moreover, Respondent introduced into evidence at least six files of White employees who had made the exact same error as Petitioner on the job element form and, as a result, had lost so many ranking points that they were disqualified from consideration for the positions for which they had applied.

CONCLUSION

Our review of the record herein requires the conclusion that the Petitioner has failed to establish that Respondent engaged in unlawful retaliation and discrimination in denying Petitioner a bonus and refusing to promote him to the position of Social Science Analyst III. Accordingly, the Petition for Review in this matter must be, and hereby is, dismissed.

SO ORDERED.

Notes

1. Administrative Judge Kaplan fully participated in the consideration and disposition of this matter, but his term on the Personnel Appeals Board expired prior to the issuance of this decision. He wishes to note that he concurs in the result and the opinion. Administrative Judge Clark became a member of the Personnel Appeals Board on November 2, 1992, and did not participate in the consideration and disposition of this matter.

2. The Equal Promotion Review Program began in 1987 under orders from the Comptroller General. The EPRP teams review the promotion reports of GAO units to determine if there are statistical disparities in the promotion rates for Blacks and Hispanics (as compared to Whites) for evaluator and evaluator-related

positions at the Band II and Band III (formerly GS-13/14 and GS-15, respectively) levels. The EPRP teams attempt to identify the causes of such promotion disparities and to devise affirmative plans for remedying the disparities. The EPRP teams only investigate those GAO units where a statistical disparity has been shown to exist by the reports compiled for that purpose.